Docket No. 16-6001

United States Court of Appeals
For The First Circuit

UNITED STATES,

Appellee,

v.

DZHOKHAR A. TSARNAEV,

Defendant – Appellant.

UNOPPOSED MOTION FOR LEAVE TO FILE A SECOND SUPPLEMENTAL OPENING BRIEF

Appellant Dzhokhar Tsarnaev, by his Counsel, moves for leave to file a Second Supplemental Opening Brief to address the effect of United States v. Davis, 139 S. Ct. 2319 (2019), on his convictions under 18 U.S.C. § 924(c) in Counts 13, 15, 16, 17, and 18. The proposed brief is attached. The government does not oppose this motion. Indeed, in other cases, the government has made concessions that dictate vacatur of the convictions on these counts. See post ¶ 5.

1. In Counts 13, 15, 16, 17, and 18, Tsarnaev was convicted of violations of § 924(c), which proscribes using a firearm in connection with a predicate "crime of violence," a term defined by 18 U.S.C. §§ 924(c)(3)(A) and (B). The predicate

"crimes of violence" for these counts were malicious destruction of property, in violation of 18 U.S.C. § 844(i) (Counts 13 and 15); conspiracy to use a weapon of mass destruction, 18 U.S.C. § 2332a(a)(2) (Count 16); conspiracy to bomb a place of public use, 18 U.S.C. §§ 2332f(a)(1) and (2) (Count 17); and conspiracy maliciously to destroy property, 18 U.S.C. §§ 844(i) and (n) (Count 18).

2. After the penalty-phase verdict, the Supreme Court held that the residual clause of the Armed Career Criminal Act's definition of "crime of violence," 18 U.S.C. § 924(e)(2)(B)(ii), was void for vagueness. Johnson v. United States, 135 S. Ct. 2551, 2557 (2015). Tsarnaev moved for a judgment of acquittal, as relevant, on Counts 13, 15, 16, 17, and 18, arguing that § 924(c)(3)(B)'s similar residual clause was unconstitutionally vague in light of Johnson, and that none of the predicate offenses categorically satisfied § 924(c)(3)(A)'s elements clause. The District Court denied the motion.

3. At the time that Tsarnaev filed his Opening Brief, this Court had held that § 924(c)(3)(B)'s residual clause was not void for vagueness "because the statute reasonably allows for a case-specific approach, considering real-world conduct, rather than a categorical approach." United States v. Douglas, 907 F.3d 1, 4 (1st Cir. 2018), vacated, ___ S. Ct. ___, 2019 WL 176716 (June 28, 2019). On the facts of this case, Tsarnaev's relevant predicates did, "by [their] nature[s],

involve a substantial risk that physical force against the person or property of another may be used in the course of committing the offense[s]." § 924(c)(3)(B).

4. However, after Tsarnaev filed his Opening Brief, the law changed. The Supreme Court held in Davis that § 924(c)(3)(B)'s residual clause must be interpreted categorically and, so interpreted, is unconstitutionally vague, 139 S. Ct. at 2236; and vacated Douglas in light of Davis. After Davis, as set forth in his proposed Second Supplemental Brief, Tsarnaev now has a strong claim that his Count 13, 15, 16, 17, and 18 convictions must be vacated because the predicate offenses do not fit § 924(c)(3)(A)'s elements clause. Indeed, in other cases, the government has conceded that neither malicious destruction of property nor conspiracy has "as an element the use, attempted use, or threatened use of physical force." § 924(c)(3)(A). See Brief for United States 6, United States v. Salas, No. 16–2170 (10th Cir. May 3, 2017) (malicious destruction of property), available at 2017 WL 1830328; Brief for United States 7 n.9, United States v. Douglas, No. 18–1129 (1st Cir. Aug. 3, 2018) (conspiracy), available at 2018 WL 3830648.

5. Thus, supplemental briefing to address Davis would be appropriate and consistent with this Court's practice. See United States v. Vazquez-Rivera, 407 F.3d 476, 487 (1st Cir. 2005) ("[T]he parties' briefs were submitted prior to a substantial change in the applicable law wrought by the Supreme Court's decisions in [Blakely v. Washington, 542 U.S. 296 (2004)] and [United States v. Booker, 543

U.S. 220 (2005]. This change constitutes an 'exceptional circumstance' in which we will permit new issues to be raised, and we accordingly accepted supplemental briefing from both sides.").

6. Appellant has conferred with counsel for the government, William A. Glaser, who indicated that the government does not oppose this motion, but notes that he will be out of the office and unable to work on the government's response between July 16 and July 31.

Respectfully submitted,

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Certificate of Service

I certify that the attached motion has been served by email and ECF on July 14, 2019, to:

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

APPEAL NO. 16-6001

UNITED STATES,
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v.

DZHOKHAR A. TSARNAEV,
Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MASSACHUSETTS

SECOND SUPPLEMENTAL OPENING BRIEF FOR DEFENDANT-APPELLANT

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Introduction

Dzhokhar Tsarnaev was convicted of multiple violations of 18 U.S.C. § 924(c), which proscribes using a firearm in connection with a predicate "crime of violence." Section 924(c)(3) defines a "crime of violence" as a felony offense that:

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

In United States v. Davis, the Supreme Court held that § 924(c)(3)(B)—the "residual clause" of the statutory definition—is unconstitutionally vague under the Fifth Amendment's Due Process Clause. 139 S. Ct. 2319, 2336 (2019). The commission of a crime of violence is an element of a § 924(c) offense. United States v. Rodriguez-Moreno, 526 U.S. 275, 280 (1999). Consequently, Tsarnaev's § 924(c) convictions remain valid only if they rest on predicate offenses that satisfy the surviving prong of the definition—the "elements clause" of § 924(c)(3)(A).

Tsarnaev's convictions on Counts 13, 15, 16, 17, and 18 do not. Counts 13 and 15 alleged as predicate offenses the malicious destruction of property (colloquially, arson), in violation of 18 U.S.C. § 844(i). Under the applicable categorical approach, § 844(i) is overbroad because it criminalizes the destruction of "any" property, including one's own (for example, burning one's own failing

business for the insurance proceeds), but § 924(c)(3)(A) requires using force against the property "of another." United States v. Salas, 889 F.3d 681, 684 (10th Cir. 2018) (accepting government's concession, so holding, and vacating § 924(c) conviction based on § 844(i) predicate offense), cert. denied, ___ S. Ct. ___, 2019 WL 2649895 (June 28, 2019). Independently, one can violate § 844(i) with a reckless mens rea, but the elements clause demands intentional conduct. See United States v. Rose, 896 F.3d 104, 109–10 (1st Cir. 2018).

Counts 16, 17, and 18 alleged as predicate offenses conspiracies to use a weapon of mass destruction, to bomb a place of public use, and maliciously to destroy property, in violation of 18 U.S.C. §§ 2332a(a)(2), 2332f(a)(1) and (2), and 844(i) and (n). These offenses do not "have as an element the use . . . of physical force." Rather, as the District Court instructed the jury, the only elements necessary to prove these conspiracies were: (i) Tsarnaev's agreement with another to commit the substantive offenses; and (ii) Tsarnaev's knowing and voluntary joining in the agreement with the intent that the substantive offenses be committed. 15.A.6850–51. Conspiracies do not fit the elements clause. United States v. Simms, 914 F.3d 229, 233–34 (4th Cir. 2019) (en banc); United States v. Lewis, 907 F.3d 891, 895 (5th Cir. 2018); United States v. Davis, 903 F.3d 483, 485 (5th Cir. 2018), aff'd in relevant part, 139 S. Ct. 2319; Brief for United States 7 n.9, United States v. Douglas, No. 18–1129 (1st Cir. Aug. 3, 2018) ("[T]he Department

of Justice's position is that a conspiracy offense does not have 'as an element the use, attempted use, or threatened use of physical force against the person or property of another.'") (quoting § 924(c)(3)(A)), available at 2018 WL 3830648.

This Court should vacate Tsarnaev's convictions on Counts 13, 15, 16, 17, and 18, and remand for entry of a judgment of acquittal on those counts.

Supplemental Statement of Facts

Section 924(c)(1) proscribes using or carrying a firearm "during and in relation to," or possessing a firearm "in furtherance of," a "crime of violence." As relevant, Tsarnaev was charged with the following § 924(c) violations:

Count	Predicate Crime Of Violence	Statutory Citation
13	"malicious destruction of property, as charged in Count Twelve"	18 U.S.C. § 844(i)
15	"malicious destruction of property, as charged in Count Fourteen"	18 U.S.C. § 844(i)
16	"conspiracy to use a weapon of mass destruction, as charged in Count One"	18 U.S.C. § 2332a(a)(2)
17	"conspiracy to bomb a place of public use, as charged in Count Six"	18 U.S.C. §§ 2332f(a)(1) & (2)
18	"conspiracy maliciously to destroy property, as charged in Count Eleven"	18 U.S.C. §§ 844(i) & (n)

Add.34, 38, 40, 42, 44.

A jury decides whether a defendant has committed the acts constituting the predicate offense, but whether a particular offense satisfies § 924(c)(3)'s definition of crime of violence is a question of law for the court. United States v. Weston,

960 F.2d 212, 217 (1st Cir. 1992), abrogated on other grounds, Stinson v. United States, 508 U.S. 36, 39–42 (1993); DE.1620, at 30 n.22. In line with the government's proposal, the District Court therefore instructed the jury that each of the relevant predicate offenses was a crime of violence as a matter of law. 15.A.6878–81; DE.1232, at 36–39. The defense did not object. The jury convicted Tsarnaev on all counts and returned a death sentence on Count 15. DE.1261, at 14, 16–19; DE.1434, at 21–22. The District Court imposed consecutive life sentences on Counts 13, 16, 17, and 18. DE.1618, at 6.

After the verdict, the Supreme Court held that a statutory provision similar to § 924(c)(3)(B)'s residual clause, namely, the residual clause of the definition of "violent felony" in the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), was void for vagueness. Johnson v. United States, 135 S. Ct. 2551, 2557 (2015). Tsarnaev moved for a judgment of acquittal on all of the § 924(c) counts, arguing that § 924(c)(3)(B)'s residual clause was "unconstitutionally vague" in light of Johnson, and that "none of the predicate offenses categorically satisfy § 924(c)(3)(A)." DE.1506, at 29; DE.1589, at 7–8.

The District Court denied the motion. The Court rejected Tsarnaev's argument that § 924(c)(3)(B) was void for vagueness, DE.1620, at 29, and ruled that each of the challenged predicates satisfied § 924(c)(3)(A):

> The defendant's argument that the crimes of use of a weapon of mass destruction, bombing of a place of public use, and malicious destruction of

> property by fire or explosive are not by their nature "violent" enough to be considered "crime[s] of violence" is refuted by its mere statement. . . . Under existing First Circuit precedent, conspiracy to commit a crime of violence is also a crime of violence for purposes of § 924(c). United States v. Turner, 501 F.3d 59, 67 (1st Cir. 2007).

DE.1620, at 32 & n.24.

Argument

In Light Of Davis, This Court Should Vacate Tsarnaev's Convictions On Counts 13, 15, 16, 17, And 18 Because The Predicate Crimes Of Violence Do Not Satisfy § 924(c)(3)(A)'s Elements Clause.

A. Legal framework.

This Court reviews the denial of a motion for judgment of acquittal *de novo*. United States v. Santos-Soto, 799 F.3d 49, 56 (1st Cir. 2015). This Court also reviews *de novo* whether a particular offense is a § 924(c)(3) crime of violence. United States v. Turner, 501 F.3d 59, 67 (1st Cir. 2007).

After Davis, which struck § 924(c)(3)(B)'s residual clause, an offense qualifies as a crime of violence only if it satisfies § 924(c)(3)(A)'s elements clause; that is, only if it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." In determining whether an offense satisfies the elements clause, this Court applies the categorical approach. United States v. Cruz-Rivera, 904 F.3d 63, 66 (1st Cir. 2018). "That means we consider the elements of the crime of conviction, not the facts of how it was committed." United States v. Taylor, 848 F.3d 476, 491 (1st Cir. 2017). A

"defendant's actual conduct is irrelevant to the inquiry," because "the adjudicator must 'presume that the conviction rested upon nothing more than the least of the acts criminalized.'" Mellouli v. Lynch, 135 S. Ct. 1980, 1986 (2015) (quoting Moncrieffe v. Holder, 569 U.S. 184, 190–91 (2013)). See Taylor, 848 F.3d at 492 ("element-based analysis" focuses on "the most innocent conduct" criminalized). Under the categorical approach, "we compare the elements of the crime . . . with Congress's definition of the type of crime that may serve as a predicate offense." United States v. Fish, 758 F.3d 1, 5 (1st Cir. 2014). A predicate offense "is overbroad if its elements allow for a conviction without satisfying the elements Congress has provided to define the required predicate offense." Id. at 6. That is, "if the statute sweeps more broadly than the generic crime, a conviction under that law cannot count as [a] . . . predicate, even if the defendant actually committed the offense in its generic form." Descamps v. United States, 570 U.S. 254, 261 (2013).

B. Malicious destruction of property does not satisfy the elements clause.

1. Section 844(i) is overbroad because it encompasses the destruction of one's own property.

For Counts 13 and 15, the predicate crime of violence alleged was malicious destruction of property, in violation of § 844(i). Section 844(i) punishes "[w]hoever maliciously damages or destroys . . . by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce."

Under the categorical approach, this offense sweeps more broadly than § 924(c)(3)(A)'s elements clause because § 844(i) criminalizes the destruction of "any" property—including the defendant's own property—whereas § 924(c)(3)(A) reaches only the use of force against the "property of another." Accepting the government's concession, the Tenth Circuit has so held. Salas, 889 F.3d at 684 ("Both parties agree that . . . the 'elements clause[]' does not apply here because § 844(i) arson does not require, as an element, the use of force against the property 'of another'; for example, § 844(i) may apply to a person who destroys his or her own property."). See also Brief for United States 6, United States v. Salas, No. 16–2170 (10th Cir. May 3, 2017) ("The United States does not assert that § 844(i) qualifies as a crime of violence under the elements clause of § 924(c)."), available at 2017 WL 1830328. The Supreme Court has reached the same conclusion. Torres v. Lynch, 136 S. Ct. 1619, 1630 & n.10 (2016) (noting, and embracing, Solicitor General's concession that elements clause of 18 U.S.C. § 16(a), which is identical to § 924(c)(3)(A), "would not reach arson in the many States defining that crime to include the destruction of one's own property").[1]

[1] District courts have held that § 844(i) is not a § 924(c)(3)(A) predicate offense. E.g., United States v. Lecron, 2019 WL 2774297, at *4–5 (N.D. Ohio July 2, 2019); United States v. Garcia, 2019 WL 95509, at *1–2 (E.D. Cal. Jan. 3, 2019); Evey v. United States, 2018 WL 6133407, at *5–6 (C.D. Cal. May 10, 2018).

The argument is straightforward. Section 844(i)'s "property" element reaches "any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" United States v. Gonzales, 520 U.S. 1, 5 (1997) (quoting Webster's Third New Int'l Dictionary 97 (1976)). The only "language limiting the breadth of that word" is § 844(i)'s requirement that the property be "used in interstate or foreign commerce," so this Court "must read" the statute "as referring to" all such property, regardless of its owner. Gonzales, 520 U.S. at 5. Thus, one can violate § 844(i) by destroying one's own property, as cases confirm. E.g., United States v. Russell, 471 U.S. 858, 859 (1985); United States v. Karmue, 841 F.3d 24, 26 (1st Cir. 2016). Conforming to that reading, the District Court's instructions permitted the jury to convict Tsarnaev of malicious destruction of property upon a finding that he destroyed "any building, vehicle, or other real or personal property." 15.A.6876.

Section 924(c)(3)(A), however, is narrower. By its plain terms, that statute encompasses only the use of force against the property "of another." That language does not reach the destruction of one's own property. See Torres, 136 S. Ct. at 1630 & n.10; Salas, 889 F.3d at 684; ante n.1. Thus, because "the elements of the indivisible statute," § 844(i), "sweep more broadly than the generic

crime" as defined in § 924(c)(3)(A), Tsarnaev's § 844(i) convictions "cannot count as . . . predicate offense[s], '*even if* the defendant actually committed the offense in its generic form.'" United States v. Castro-Vazquez, 802 F.3d 28, 35 (1st Cir. 2015) (quoting Descamps, 570 U.S. at 261).

The modified categorical approach has no role to play. The nature of the property destroyed is not an element of a § 844(i) offense. "Elements are the 'constituent parts' of a crime's legal definition—the things the 'prosecution must prove to sustain a conviction.'" Taylor, 848 F.3d at 491 (quoting Mathis v. United States, 136 S. Ct. 2243, 2248 (2016)). Elements (as opposed to "factual means") must be found unanimously and beyond a reasonable doubt. United States v. Tavares, 843 F.3d 1, 15 (1st Cir. 2016) ("[W]hat facts a jury must agree upon unanimously plays a crucial role in distinguishing between elements and mere factual means."); see Mathis, 136 S. Ct. at 2250 (statutory alternatives not elements where "a jury need not agree on which . . . was actually involved"). Here, to convict Tsarnaev of the predicate § 844(i) offenses, the jury was not required to agree on the nature of the property destroyed. Rather, tracking the statutory language, the District Court instructed the jury that it was required to find only that Tsarnaev had destroyed "any building, vehicle or other real or personal property" that was "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." 15.A.6876. Section 844(i) "property" is

indivisible and, with respect to § 924(c)(3)(A), overbroad. Therefore, this Court may not employ the modified categorical approach to ascertain the nature of the property destroyed. See Descamps, 570 U.S. at 265 (modified approach authorized where statute defines predicate "not . . . overbroadly, but instead alternatively").

2. Section 844(i) is overbroad because it has a mens rea of recklessness.

Section 844(i) is not an elements-clause crime of violence for a second, independent reason: the offense requires a mens rea of only recklessness, whereas § 924(c)(3)(A) demands conduct that is intentional. Section 844(i) applies where a defendant "maliciously" damages or destroys property. The District Court instructed the jury that "[t]o act maliciously means to act intentionally or with deliberate disregard of the likelihood that damage or injury will result." 15.A.6876. That instruction conformed to the government's proposal, DE.1232, at 33, and to the uniform rule among the Circuits, United States v. Grady, 746 F.3d 846, 848–49 (7th Cir. 2014) (approving similar instruction, and collecting cases from the Third, Fourth, Fifth, and Tenth Circuits holding that "maliciously" in § 844(i) encompasses recklessness). See 2 Modern Federal Jury Instructions—Criminal ¶ 30.01, Instruction 30–5 (Matthew Bender 2019) (same).

But this Court has held that offenses with a mens rea of mere recklessness do not satisfy the ACCA's materially identical elements clause, 18 U.S.C. § 924(e)(2)(B)(i). Rose, 896 F.3d at 109–10 ("[T]his circuit's case law now

forecloses the argument that crimes with a mens rea of recklessness may be violent felonies under the force clause.").[2] See also United States v. Windley, 864 F.3d 36, 39 (1st Cir. 2017); United States v. Bennett, 868 F.3d 1, 4, 8 (1st Cir. 2017). Consequently, § 844(i) is broader than the elements clause because it does not require intentional conduct. Evey, 2018 WL 6133407, at *6 ("Section 844(i)'s mens rea requirement fails to satisfy the force clause because it incorporates a mens rea of recklessness."); see United States v. Johnson, 227 F. Supp. 3d 1078, 1086–90 (N.D. Cal. 2016) (same, with respect to 18 U.S.C. § 844(f)). Again, the modified categorical approach is inapplicable. Section 844(i)'s mental state element ("maliciously") is indivisible as between intentional and reckless conduct, and Tsarnaev's jury was not required to distinguish between the two in order to convict. Thus, applying the minimum-conduct rule, see Taylor, 848 F.3d at 492, this Court must presume that Tsarnaev acted with recklessness.

3. It is immaterial that Tsarnaev was convicted of malicious destruction of property resulting in personal injury and death.

Tsarnaev was convicted of arson with the additional elements that the offenses resulted in personal injury and death. Add.32, 36; DE.1261, at 13, 15. These elements do not salvage Tsarnaev's convictions on Counts 13 and 15.

[2] The ACCA's elements clause, § 924(e)(2)(B)(i), is in pertinent part identical to § 924(c)(3)(A), as both require the "use, attempted use, or threatened use of physical force." This Court has applied precedents interpreting the former to cases involving the latter. E.g., Taylor, 848 F.3d at 491.

First, these elements do not figure in the § 924(c)(3)(A) analysis because Counts 13 and 15 alleged that the predicate crimes of violence were "malicious destruction of property" simpliciter, not "malicious destruction of property resulting in personal injury and death." Add.34, 38. In this context, specificity matters. See Russell v. United States, 369 U.S. 749, 765 (1962) ("'It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species,—it must descend to particulars.'") (quoting United States v. Cruikshank, 92 U.S. 542, 558 (1875)). Moreover, in order to indict Tsarnaev on Counts 13 and 15, the grand jury did not have to find probable cause that his malicious destruction of property resulted in personal injury or death. Nor, in order to convict Tsarnaev on Counts 13 and 15, did the petit jury have to find these elements proved. In opposing Tsarnaev's motion for judgment of acquittal, the government described the predicates as "malicious destruction of property in violation of 18 U.S.C. § 844(i)," with no reference to the "personal injury results" or "death results" allegations. DE.1542, at 17. In denying the motion, the District Court did likewise. DE.1620, at 24.

Second, and more fundamentally, even if considered, these elements do not cure § 844(i)'s overbreadth. Recall that § 844(i) sweeps more broadly than

§ 924(c)(3)(A) for two reasons: the former criminalizes destroying one's own property, not the property of another; and criminalizes a mens rea of recklessness, not intent. See ante §§ B.1 and B.2. The "personal injury results" and "death results" elements of the aggravated § 844(i) offense affect neither.

Section 844(i) authorizes enhanced punishment if "personal injury results" or if "death results . . . as a direct or proximate result of conduct prohibited by this subsection." This language adds no further actus reus or mens rea requirements to the basic offense. As to actus reus, § 844(i) demands, at most, but-for causation. See Burrage v. United States, 571 U.S. 204, 210–11 (2014) ("'Results from' imposes . . . a requirement of actual causality."). The categorical approach evaluates "'the minimum conduct criminalized' by the statute's elements." United States v. Edwards, 857 F.3d 420, 423 (1st Cir. 2017) (quoting Moncrieffe, 569 U.S. at 191)). But-for causation "represents '*the minimum* requirement for a finding of causation when a crime is defined in terms of conduct causing a particular result.'" Burrage, 571 U.S. at 211 (quoting Model Penal Code § 2.03, Explanatory Note). Section 844(i) thus requires only that the "conduct prohibited by this subsection"—that is, "maliciously damag[ing] or destroy[ing], . . . by means of fire or an explosive, any . . . real or personal property," including one's own—have been the but-for cause of "personal injury" or "death."

As to mens rea, § 844(i) demands nothing more than that necessary to prove the basic offense: recklessness as to the possibility of property damage, personal injury, or death. See 2 Modern Federal Jury Instructions—Criminal ¶ 30.01, Instruction 30–6 (Matthew Bender 2019) ("The government is not required to prove that the defendant intended to cause the death of (or injure) [the victim]."). Indeed, this Court has held that materially identical language in 21 U.S.C § 841(b)(1)(C)—which increases the statutory sentencing range for certain drug offenses "if death or serious bodily injury results"—imposes "strict liability." United States v. Soler, 275 F.3d 146, 152–53 (1st Cir. 2002). See also id. at 152 ("[T]he statute does not speak to the defendant's state of mind.").

Thus, as the District Court instructed, to convict Tsarnaev of these elements, the jury needed to find only that Tsarnaev "through his conduct, directly or proximally caused . . . death." 15.A.6878. And the District Court had already charged the jury that the "most innocent conduct" necessary to violate § 844(i), see Taylor, 848 F.3d at 492, was the reckless destruction of any property, including Tsarnaev's own. 15.A.6876. To convict on the "personal injury results" and "death results" elements, the jury was not required to find that Tsarnaev had destroyed the "property of another," as specified by § 924(c)(3)(A). Nor, to convict on these elements, was the jury required to find that Tsarnaev intended to cause injury or death, as specified by this Court's elements-clause precedents.

Rose, 896 F.3d at 109–10; Windley, 864 F.3d at 38–39. Section 924(c)(3)(A)'s text dictates a "'categorical approach'" that "'consider[s] the elements of the crime of conviction, not the facts of how it was committed.'" Cruz-Rivera, 904 F.3d at 66 (quoting Taylor, 848 F.3d at 491)). Under that circumscribed framework, these additional elements do not bring § 844(i) within the scope of § 924(c)(3)(A).

C. None of the challenged conspiracies satisfies the elements clause.

For Counts 16, 17, and 18, the predicates alleged were conspiracies to use a weapon of mass destruction, to bomb a place of public use, and maliciously to destroy property, §§ 2332a(a)(2), 2332f(a)(1) and (2), and 844(i) and (n). In general, "[t]o sustain a conspiracy conviction, the government must show that the defendant knowingly agreed with at least one other person to commit a crime, intending that the underlying offense be completed." United States v. Ledee, 772 F.3d 21, 32 (1st Cir. 2014). Here, the District Court instructed the jury that each of these conspiracies had only two elements: agreeing to commit the substantive offense, and knowingly joining in the agreement. E.g., 15.A.6850 (defining elements of conspiracy to use a weapon of mass destruction: "First, . . . the defendant and another agreed to use a weapon of mass destruction; and, second . . . the defendant knowingly and voluntarily joined in the agreement intending that the crime of using a weapon of mass destruction be committed."). See also 15.A.6850–52 (same, with respect to other conspiracies). The Court charged that

"[t]he government does not have to prove that a defendant . . . participated in every act of the agreement, or that he played any particular role. It only needs to prove that the defendant knew of and joined in the agreement with the intent that its unlawful purpose be achieved." 15.A.6851.

Those elements do not include "the use, attempted use, or threatened use of force." § 924(c)(3)(A). Rather, "conspiracy's elements are met as soon as the participants have made an agreement." Sessions v. Dimaya, 138 S. Ct. 1204, 1219 (2018). See 15.A.6852 (jury charge) ("The crime of conspiracy is complete when the conspirators form their agreement to commit the underlying offense."). Consequently, federal courts of appeals have held that conspiracies, which criminalize mere agreements, do not satisfy § 924(c)(3)(A)'s elements clause. For example, in Simms, the en banc Fourth Circuit explained that conspiracy to commit Hobbs Act robbery does not qualify as a crime of violence "because to convict a defendant of this offense, the Government must prove only that the defendant agreed with another to commit actions that, if realized, would violate the Hobbs Act. Such an agreement does not invariably require the actual, attempted, or threatened use of physical force." 914 F.3d at 233–34. See also Lewis, 907 F.3d at 895 ("'Conspiracy to commit an offense is merely an agreement to commit an offense.' Consequently, conspiracy to commit Hobbs Act robbery fails to satisfy the requirements of § 924(c)(3)(A)'s elements clause.") (quoting Davis, 903

F.3d at 485); Davis, 903 F.3d at 485 ("[T]he conspiracy offense does not necessarily require proof that a defendant used, attempted to use, or threatened to use force."). Indeed, the government has told this Court that the "Department of Justice's position" is that conspiracies do not qualify as elements-clause predicates. United States v. Douglas, 907 F.3d 1, 6 n.7 (1st Cir. 2018) (noting concession), vacated, ___ S. Ct. ___, 2019 WL 176716 (June 28, 2019).

Below, the District Court reasoned that "conspiracy to commit a crime of violence is also a crime of violence for purposes of § 924(c)." DE.1620, at 32 n.24 (citing Turner, 501 F.3d at 67). But Turner was based on § 924(c)(3)(B)'s residual clause, as the decision makes clear: "'[W]hen a conspiracy exists to commit a crime of violence, . . . the conspiracy itself poses a substantial risk of violence, which qualifies it under [§] 924(c)(1) and [§] 924(c)(3)(B) as a crime of violence.'" 501 F.3d at 67 (quoting United States v, Elder, 88 F.3d 127, 129 (2d Cir. 1996)). See also, e.g., United States v. Mitchell, 23 F.3d 1, 3 (1st Cir. 1994) (holding that conspiracy to commit arson was crime of violence under Bail Reform Act, 18 U.S.C. § 3156(a)(4), because conspiracy, "even though an inchoate crime, [is] nonetheless an act 'involving a substantial risk of violence'") (quoting United States v. Chimurenga, 760 F.2d 400, 404 (2d Cir. 1985)).[3]

[3] As above, see supra § B.3, it is irrelevant that Tsarnaev was convicted of these conspiracies with the additional elements that they resulted in death. Add.5, 21–

D. Tsarnaev's claim is cognizable.

Below, the District Court discussed the possibility that Tsarnaev had waived or forfeited his elements-clause argument by failing to object to the jury instructions, but did not rule that either waiver or forfeiture had occurred, determining instead that "there was no error." DE.1620, at 30 n.22. In any event, Tsarnaev's motion for judgment of acquittal preserved this claim. In Cruz-Rivera, this Court concluded that the defendant's motion for judgment of acquittal on his § 924(c) counts of conviction "preserved" his challenge to the use of carjacking as a § 924(c) predicate. 904 F.3d at 65. That was so, even though the defendant had "raised no contemporaneous objection to the jury instructions," which identified carjacking as a crime of violence as a matter of law. Brief for United States 10,

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22, 31; DE.1261, at 2, 7, 12. These elements do not figure in the § 924(c)(3)(A) calculus because Counts 16, 17, and 18 alleged that predicate crimes of violence were "conspiracy[ies]", not "conspiracy[ies] resulting in death." Add.40, 42, 44. See also 15.A.6880–81 (jury instructions) (defining predicates as conspiracies simpliciter). Even if considered, these elements do not convert conspiracy into an offense involving the use of force. To find these elements proved, the jury was required to find only that the conspiracies were the but-for cause of any deaths, not that Tsarnaev engaged in other conduct or intended to cause death. See 15.A.6852 ("A death results from a charged crime if the death would not have occurred if the crime had not been committed."); see also, e.g., United States v. McVeigh, 153 F.3d 1166, 1195 (10th Cir. 1998) ("Nothing in § 2332a(a)(2) links the 'if death results' language of the statute to any scienter whatsoever."). For purposes of the elements clause, the unintended causation of death does not constitute the use of force. Leocal v. Ashcroft, 543 U.S. 1, 9–10 (2004). Indeed, even the reckless causation of injury falls short. Rose, 896 F.3d at 109–10.

United States v. Cruz-Rivera, No. 16–1321 (1st Cir. June 12, 2018), available at 2018 WL 3035960; see also Brief for Appellant 20, id. (1st Cir. May 22, 2018).

Even if Tsarnaev had failed to raise this claim at all, the claim would still be cognizable. At the time of trial, any elements-clause objection would have been pointless. Each of the challenged predicates qualified under § 924(c)(3)(B)'s residual clause, e.g., Mitchell, 23 F.3d at 3, and the Supreme Court had twice rejected vagueness challenges to the ACCA's similar residual clause, James v. United States, 550 U.S. 192 (2007); Sykes v. United States, 564 U.S. 1 (2011), both overruled, Johnson, 135 S. Ct. at 2563. In light of this then-settled law, this Court, on direct appeal, has reviewed *de novo* a challenge to the use of Hobbs Act robbery as a § 924(c) predicate, notwithstanding the defendant's "failure to timely raise" the argument "before the district court." United States v. Garcia-Ortiz, 904 F.3d 102, 106 (1st Cir. 2018). This Court reasoned that any forfeiture would be "overlooked," and plain-error review would not apply, because the defendant had understandably "failed to anticipate the Supreme Court overruling itself on a constitutional principle." Id. See also Lassend v. United States, 898 F.3d 115, 122–23 (1st Cir. 2018) (finding cause to excuse 28 U.S.C. § 2255 movant's default of Johnson challenge to ACCA predicate, because claim "was not 'available at all' until the Supreme Court 'explicitly overrule[d]' Sykes and James") (quoting Smith

v. Murray, 477 U.S. 527, 537 (1986), then Reed v. Ross, 468 U.S. 1, 17 (1984)). Consequently, Tsarnaev's claim is properly before this Court.

Conclusion

This Court should vacate Tsarnaev's convictions on Counts 13, 15, 16, 17, and 18, and remand for entry of a judgment of acquittal on those counts.

Respectfully submitted,

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